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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

JOHN J. POTTS,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

1. Must not this Court review Pennsylvania's conflicting and unnecessarily restrictive application of the knock-and-announce rule?

2. Where police executing a valid search warrant have information that contraband will likely be destroyed, does the fourth amendment permit their entrance immediately after police knock and announce their identity and purpose?

3. Was a contrary conclusion here particularly inappropriate given the suspect's diminution of his privacy interest and proximity to a common drug disposal site, as well as the trial court's finding that the police action was reasonably necessary to prevent the destruction of evidence?

4. Where the manner of police entry comports with the goals of the knock-and-

announce rule, does a mere technical violation, arising out of the police's immediate entry, require the extreme remedy of suppression?

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OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

JOHN J. POTTS,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a Writ of Certiorari issue to review the final Judgment and Opinion of the Superior Court of Pennsylvania, which is the highest state court to render a decision on the merits of this case.

The Pennsylvania Superior Court entered its decision on May 31, 1985. Petitioner then timely applied to the Pennsylvania Supreme Court for discretionary

state court review. Petitioner's application was initially granted, and the case was fully briefed and argued at the October 1986 Session of the Pennsylvania Supreme Court. Thereafter, by Order dated November 25, 1986, the Pennsylvania Supreme Court inexplicably dismissed the appeal as "improvidently granted" (Order attached as Appendix A). Because under Pennsylvania law this was not a decison on the merits, Commonwealth v. Britton, 509 Pa. 620, 506 A.2d 895 (1986); Dayton v. Dayton, 509 Pa. 632, 506 A.2d 901 (1986); Commonwealth of Pennsylvania Liquor Control Board v. Ronnie's Lounge, Inc., 485 Pa. 72, 400 A.2d 1317 (1979), the writ of certiorari, if allowed, is appropriately directed to the intermediate state appellate court. See e.g. Pennsylvania v. Henderson, 446 U.S. 905 (1980).

OPINIONS BELOW

The Judgment of the Pennsylvania Superior Court, which is officially reported at 330 Pa. Superior Ct. 313, and that court's unreported Memorandum Opinion, are set forth in full in Appendix B at 1B-6B. The unreported Opinion of the Philadelphia Court of Common Pleas, which was filed on June 19, 1984, is set forth in full in Appendix C at 1C-8C. The Oral Findings of Fact and Conclusions of Law by the Philadelphia Court of Common Pleas, entered on April 11, 1984, are set forth in full in Appendix D at 1D-9D.

STATEMENT OF JURISDICTION

The Judgment of the Superior Court of Pennsylvania was entered on May 31, 1985. The Pennsylvania Supreme Court, by Order

entered November 25, 1986, declined to exercise authority in the case.[1]

The jurisdiction of this Court to review the judgment of the Superior Court of Pennsylvania is invoked pursuant to 28 U.S.C.S. §1257(3) (Law. Co-op 1977).

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1. The Judgment on which review is sought was entered by a three-judge panel of the Pennsylvania Superior Court. Pursuant to this Court's decision in Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95, 89-100 (1962), the judgment of a panel or division of the appropriate appellate court is reviewable on certiorari if that was the highest state court in which a decision could be had. Under Pennsylvania practice, cases are heard before the Superior Court en banc or by a panel "as determined by the court in its discretion." Pa.R.A.P. 3721. There is no right to reargument of a panel decision before the en banc court, Pa.R.A.P. 3723, nor is a request for en banc reargument a prerequisite to discretionary review in the state supreme court. Pa.R.A.P. 1113. Since the state supreme court ultimately declined to review this case, the Superior Court panel is the highest state court in which a decision on the federal questions could be had. See Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 678 n.1 (1968); American Ry. Express Co. v. Levee, 263 U.S. 19 (1923).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Four, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated...

United States Constitution, Amendment Fourteen, which provides:

> ... No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 1, 1983, Philadelphia narcotics police searched respondent's residence for illegal drugs pursuant to a search warrant, with specific knowledge that these drugs were stored in respon-

dent's kitchen. Police found the contraband (72 grams of methamphetamines) precisely where they expected and immediately arrested respondent for a variety of drug-related offenses.[2]

Respondent, represented by retained counsel, litigated a pre-trial motion to suppress the drugs claiming that the police violated the knock-and-announce rule in executing the search warrant. At the suppression hearing, petitioner established the following facts as credited by the suppression judge:

At the time of the warrant's execution, supervising Philadelphia Police Officer Robert Dintino had twelve years experience as a narcotics officer. In nearly all

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2. Respondent was charged with knowingly or intentionally possessing a controlled substance and with manufacture, delivery or possession with intent to manufacture or deliver a controlled substance.

of the hundreds of residential searches pursuant to warrants which he had conducted, the suspect-occupants attempted to dispose of contraband where they had the opportunity to do so. Where the narcotics were stored on the first floor, the kitchen sink was nearly always used to dispose of the contraband (Appendix at 5D) (N.T. 3/1/84, 10-12, 21, 26).

Here, the police had reliable information that illegal drugs (mainly methamphetamines) were stored in the kitchen of respondent's Philadelphia residence. Before the September 1, 1983, 5:30 p.m. execution of this concededly valid warrant, police observed that defendant's front door was wide open, that his screen door was slightly ajar and unlatched, and that anyone could look into the living room (Appendix at 2C-3C, 2D-3D) (N.T. 3/1/84, 8, 17-19). From this vantage point they saw

respondent sitting on a living room couch approximately ten feet from the kitchen and some forty feet from the front door.[3] Based on this unusually complete knowledge of respondent's proximity to the drugs and a drug disposal site -- the kitchen sink -- and his past experience conducting drug searches, Officer Dintino reasonably concluded that respondent was likely to attempt to dispose of the contraband and that he would likely succeed unless the police acted quickly in entering the house (Appendix at 2C-3C, 2D-5D) (N.T. 3/1/84, 8-12, 20-27). Indeed, the suppression court judge specifically found that the police "reasonably believed that the contraband would be destroyed if they had not

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3. Officer Dintino's testimony established that respondent's house contained one large living room in front of the kitchen, rather than the more usual layout of a living room in front and a dining room in the middle of the first floor (N.T. 3/1/84, 8-9, 20).

entered immediately" (Appendix at 5D). Additionally, she found that

> by leaving his door open, the defendant's privacy... interests were substantially diminished.

(Appendix at 5D).

In serving the warrant, the officers first announced their presence and possession of a warrant, and displayed their badges. They then immediately entered peaceably, briskly walked over to respondent and served him with the warrant. As expected, drugs were located in their subsequent search of the kitchen (Appendix at 3C, 3D-4D) (N.T. 3/1/84, 8, 12-13, 19-27).

Despite these facts and her own findings, the suppression court judge suppressed the seized contraband. The critical defect, in her opinion, was the police's failure to wait for respondent to answer the door. In effect, she held that even a reasonable search violates the

fourth amendment if it technically fails to meet all the requirements of the knock-and-announce rule.

Petitioner, the Commonwealth of Pennsylvania, appealed to the Pennsylvania Superior Court which, on May 31, 1985, per curiam affirmed the suppression court's order. The Commonwealth then sought state supreme court discretionary review, which was initially granted but then denied without opinion as improvidently granted, two justices dissenting.

Pennsylvania courts thus have concluded that the fourth amendment, as codified in Pa.R.Crim.P. 2007,[4] requires the

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4. Pa.R.Crim.P. 2007 provides:

> (a) A law enforcement officer executing a search warrant shall, before entry, give, or make reasonable effort to give, notice of his identity, authority and purpose to any occupant of the pre-

Footnote 4 continued on next page

suppression of evidence merely because police reasonably sought to prevent its destruction. Because the fourth amendment does not forbid reasonable police conduct, the Commonwealth of Pennsylvania now seeks this Court's review.

Footnote 4 continued:

> mises specified in the warrant, unless exigent circumstances require his immediate forcible entry.
>
> (b) Such officer shall await a response for a reasonable period of time after his announcement of identity, authority and purpose, unless exigent circumstances require his immediate forcible entry.
>
> (c) If the officer is not admitted after such reasonable period, he may forcibly enter the premises and may use as much physical force to effect entry therein as is necessary to execute the search.

REASONS FOR GRANTING THE WRIT

IT IS ESSENTIAL THAT THIS COURT REVIEW PENNSYLVANIA'S CONFLICTING AND UNREASONABLY RESTRICTIVE APPLICATION OF THE KNOCK-AND-ANNOUNCE RULE.

The fourth amendment forbids searches conducted in an unreasonable manner. See Ker v. California, 374 U.S. 23, 38 (1963). Police conducted the search here at issue in a manner found reasonably necessary to avoid the destruction of evidence. Pennsylvania courts nonetheless found a fourth amendment violation because the exigencies surrounding the search permitted only substantial rather than technically complete compliance with Pennsylvania's knock-and-announce rule.[5] The erroneous use of the

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5. Pa.R.Crim.P. 2007 (knock-and-announce rule) was held by the Pennsylvania Superior Court to be "a codification of the Fourth Amendment of the Federal Constitution" and state constitutional provisions (Appendix

Footnote 5 continued on next page

fourth amendment's exclusionary rule to invalidate reasonable police behavior mandates review and reversal by this Court. See Massachusetts v. Sheppard, 468 U.S. 981, 990 (1984) (where "police conduct [is] ... objectively reasonable and largely error-free," the exclusionary rule must not be applied).

In executing the concededly valid search warrant, the police knocked and announced their identity and purpose before entering respondent's ajar front screen door. Their decision immediately to enter

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Footnote 5 continued:

at 4B). See Commonwealth v. DeMichel, 442 Pa. 553, 561, 277 A.2d 159, 163 (1971); Commonwealth v. Newman, 429 Pa. 441, 240 A.2d 795 (1968) (leading Pennsylvania cases holding that Pennsylvania's knock-and-announce rule is required by fourth amendment). Even where state grounds are intermixed in a lower court's holding, however, the state court's reliance on federal grounds warrants review by this Court. See Oregon v. Kennedy, 456 U.S. 667 (1982).

and preclude any attempt to dispose of the drugs was reasonably founded on specific information: '1) the contraband (narcotics) was readily disposable; 2) the drugs were proximate to a customary drug-disposal site, the kitchen sink; 3) respondent was sitting near the kitchen door and some forty feet from front door, too far away to thwart an effort to dispose of the drugs in the sink. Based on these circumstances, and twelve years experience with hundreds of residential search warrant executions, the supervising officer reasonably concluded that it was necessary to immediately enter through the front screen door after knocking and announcing identity and purpose. Indeed, the suppression court specifically so found, but nonetheless ordered suppression. This was inappropriate.

Where the police possess specific information that the object of the search

is in jeopardy, knocking and announcing should be held to satisfy the fourth amendment. To make police also wait, knowing drug suspects inside are only a toilet-flush away from criminal immunity, effectively grants drug suspects a "constitutional right to destroy or dispose of evidence," a right this Court has long refused to find in the fourth amendment. Ker v. California, 374 U.S. at 39 ("no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with" the knock-and-announce rule).

Suppression here was further wrong because the search plainly met the three policy goals of the knock-and-announce rule: 1) to reduce the likelihood of injury to police officers, who might be "mistaken, upon an unannounced intrusion

into a home, for someone with no right to be there," Sabbath v. United States, 391 U.S. 585, 589 (1968) (interpreting federal knock-and-announce statute, 18 U.S.C.S. 3109 (Law. Co-op 1979)); 2) to prevent needless damage to private property, see United States v. Bustamante-Gamez, 488 F.2d 4, 9-12 (9th Cir. 1973), cert. denied, 416 U.S. 970 (1974); and 3) to respect the suspect's right of privacy. See Miller v. United States, 357 U.S. 301, 313 (1958).[6] Consistent with these objectives, the police here reasonably concluded that peaceably entering, immediately after knocking, announcing purpose and identity, and showing their badges, would be safer than risking a frantic race for the drugs and disposal site: a high-stakes race in which the possibility of violence would be

6. See J.W. Hall, Search and Seizure, §19 at pp. 542-550 (1982); W. LaFave, Search and Seizure, §4.8 at pp. 280-284 (2nd Ed. 1987).

far greater than briskly detaining respondent before he had a chance to act. Similarly, there was no risk to private property, since the police merely opened the already ajar screen door and peaceably walked across the room to detain respondent. Finally, the invasion of respondent's privacy was minimal. The front door on this row house was wide open, and the living room where respondent was sitting was exposed for all to see. See Appendix at 5C and 5D (trial court finds as a fact that the open front door diminished respondent's privacy interest).[7]

7. Several states have held that where the suspect's expectation of privacy is diminished, substantial compliance with the knock-and-announce rule is sufficient. See People v. Peterson, 9 Cal.3d 717, 108 Cal. Rptr. 835, 511 P.2d 1187, 1192 (1973) (thorough discussion of appropriateness of "substantial compliance" rule where privacy interests are diminished); Bell v. State, 165 Ind. App. 56, 330 N.E.2d 752 (1975); State v. Gagne, 22 N.C. App. 615, 207 S.E.2d 384 (1974), cert. denied, 285 N.C. 761, 209 S.E.2d 285 (1974); see also United States v. Johns, 466 F.2d 1364 (5th Cir. 1972) (similar federal court holding).

Review by the Court is essential to make clear that the exclusionary rule should not have been applied where, as here, the purposes of the knock-and-announce rule have been served. See Segura v. United States, 468 U.S. 796, 804 (1984). Such review by this Court is also mandated to resolve the conflicting federal and state decisions about the "destruction of evidence" exception to the knock-and-announce rule in narcotics cases.

The majority of the circuits have effectively held that where readily disposable narcotics are being sought, the police reasonably may conclude, without waiting for the anticipated destruction to begin, that strict adherence to the knock-and-announce rule's waiting requirement simply allows drug suspects the opportunity

to destroy the evidence.[8] Many state courts, however, have reached the opposite

8. See United States v. Nolan, 718 F.2d 589 (3d Cir. 1983); United States v. Tolliver, 665 F.2d 1005, 1007-1008 (11th Cir.), cert. denied, 456 U.S. 935 (1982) (disposability of cocaine justified non-compliance with knock-and-announce rule); United States v. Eddy, 660 F.2d 381, 385 (8th Cir. 1981) (police properly entered without any announcement where they reasonably feared cocaine would be destroyed); United States v. Whitney, 633 F.2d 902, 908-10 (9th Cir. 1980), cert. denied, 450 U.S. 1004 (1981) (destructibility of narcotics alone may justify immediate entry but does not, without more, excuse failure to knock and announce); United States v. Metz, 608 F.2d 147, 154-5 (5th Cir. 1979), cert. denied, 449 U.S. 821 (1980); United States v. Jackson, 585 F.2d 653, 662 (4th Cir. 1978) (entry simultaneous with knocking and announcing is permissible where police are seeking evidence "susceptible of easy destruction"); Rodriguez v. Butler, 536 F.2d 982, 987 (2d Cir. 1976), cert. denied, 429 U.S. 943 (1976) (fourth amendment required no notice at all since narcotics were easily destructible; police need not wait for evidence that destruction has already begun). But see United States v. Kane, 637 F.2d 974, 980 (3d Cir. 1981) (noting in dictum that some courts have "refused to find [a "destruction of evidence"] exception based on the 'mere presence of drugs' on the premises"); United States v. Pratter, 465 F.2d 227 (7th Cir. 1972) (knocking and announcing without waiting was not enough, notwithstanding disposability of drugs).

conclusion on fourth amendment grounds. Like Pennsylvania, they insist upon technically perfect compliance with the knock-and-announce rule in narcotics searches, forbidding the police from entering without awaiting admittance, unless they hear or see indications that the occupants have actually undertaken to dispose of the drugs.[9] Invariably, those courts

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9. See e.g. State v. Mendoza, 104 Ariz. 395, 454 P.2d 140 (1969); People v. Valdivia, 114 Cal. App.3d 24, 170 Cal. Rptr. 431 (2d Dist. 1980); State v. Anonymous, 30 Conn. Supp. 197, 308 A.2d 251 (1973); People v. Ouellette, 78 Ill.2d 511, 36 Ill. Dec. 666, 401 N.E.2d 507 (1979); Crabtree v. State, 479 N.E.2d 70 (Ind. App. 1985); Commonwealth v. Scalise, 387 Mass. 413, 439 N.E.2d 818 (1982); State v. Carufel, 112 R.I. 664, 314 A.2d 144 (1974); Keeter v. Commonwealth, 222 Va. 134, 278 S.E.2d 841 (1981), cert. denied, 454 U.S. 1053 (1981); State v. Jeter, 30 Wash. App. 360, 634 P.2d 312 (1981), cert. denied, 96 Wash. 2d 1027 (1982); State v. Cleveland, 114 Wis.2d 213, 338 N.W.2d 500, aff'd 118 Wis. 2d 615, 348 N.W.2d 512 (1984) (collecting cases).

reject the police's common-sense conclusion that the only rational response by a drug suspect wishing to avoid years in prison is to quietly take the drugs and flush them down the toilet or sink: an easy, undetectable process that obviously takes less than the minute or so during which police are required to stand politely at the door.

This case presents the opportunity to make clear that proper application of the knock-and-announce rule does not require rejection of common sense. The inevitability of the exigency rejected in Pennsylvania has led other state courts to permit partial or total divergence from the knock-and-announce rule in drug searches.[10] This

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10. See People v. Lujan, 174 Colo. 554, 484 P.2d 1238 (1971) (knock-and-announce not required where "such notice is likely to result in the evidence subject to seizure being easily and quickly destroyed or disposed of, which is true in every case

Footnote 10 continued on next page

Court must now specifically resolve the conflict which exists and vindicate the latter, more rationale approach. In the

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Footnote 10 continued:

involving a search for narcotics... Certainly, if the police officers are looking for a grand piano, notice can fairly be required without jeopardizing police search and seizure practice"); Marvel v. State, 290 A.2d 641 (Del. Supp. 1972); Cox v. State, 160 Ga. App. 199, 286 S.E.2d 482 (1981) (easy destructibility of contraband constitutes "reasonable grounds to believe that fore-warning would lead to [its] immediate destruction"); Henson v. State, 236 Md. 518, 204 A.2d 516 (1964); State v. Parker, 283 Minn. 127, 166 N.W.2d 347 (1969) ("...'the perfection of small firearms and the development of indoor plumbing through which evidence can quickly be destroyed, have made [statutes requiring notice and waiting before entry] a dangerous anachronism. In many situations... a rule requiring officers to forfeit the valuable element of surprise seems senseless and dangerous.'") quoting Kaplan, Search and Seizure, A No-Man's Land in the Criminal Law, 49 Cal. L.Rev. 474, 502 (1961); State v. Meyer, 209 Neb. 757, 311 N.W.2d 520 (1981); State v. Smith, 37 N.J. 481, 181 A.2d 761, 771-72 (1962), cert. denied, 374 U.S. 835 (1963) ("The nature of the contraband was such that if the officers' mission had first been announced, the

Footnote 10 continued on next page

more than two decades which have passed since Ker v. California, there has been an ever-widening conflict concerning the "destruction of evidence" exception. This case permits resolution of that conflict.

Where, as here, police know that the suspect and the drugs are near a drug disposal site, and the suspect himself has shown no concern for his own privacy rights, it is manifestly reasonable for

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Footnote 10 continued:

articles likely would have literally gone down the drain.... In short, if admittance had first been demanded, the State's clear right to search and seize as an incident to the arrest could have been defeated. Pushers of narcotics usually have but small quantities with them, the easier to part with their wares in the face of an arrest, and users rarely have a large supply."); People v. DeLago, 16 N.Y.2d 289, 266 N.Y.S.2d 353, 213 N.E.2d 659, (1965), cert. denied, 383 U.S. 963 (1966) (destructibility of object of search is grounds, in and of itself, for special warrant permitting unannounced entry); State v. Mitchell, 6 Or. App. 378, 487 P.2d 1156, 1160-61 (1971).

police, who have knocked and announced their identity and purpose, to enter immediately, especially where they do so without the slightest destruction of property. See United States v. Bustamante-Gamez, 488 F.2d at 9-12 (where evidence is disposable, entry simultaneous with knocking and announcing is permissible where it can be accomplished without damage to private property; primary concern is with announcement, not the waiting portion of the rule).

The fourth amendment must not be interpreted "to nullify the state's clear right to search by imposing a condition which would defeat it." State v. Smith, 181 A.2d at 771 ("The Fourth Amendment does not transmute a 'reasonable search into an 'unreasonable' one merely because the officer discharged his duty to arrest and search in a manner which fairly appeared necessary for the successful enforcement of

the state's right."). It is, thus, imperative that this Court grant review and clarify the contours of the knock-and-announce rule. Such action is essential so that the rule can no longer be wielded, as it was here, to punish reasonable police conduct and defeat compelling societal interests.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

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SUPREME COURT OF PENNSYLVANIA

Eastern District

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	No. 156 E.D. Appeal Docket 1985
v.	:	
JOHN J. POTTS	:	

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal having been improvidently granted, the same is hereby dismissed.

BY THE COURT:

/s/
Marlene F. Lachman, Esq.
Prothonotary

Dated: 11/25/86

[J-232 of 1986]
IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	No. 156 E.D. Appeal Dkt. 1985
	:	
	:	Appeal from Order of Superior Court entered May 31, 1985, at No. 1336 Philadelphia 1984, Affirming Order of Court of Common
v.	:	Pleas of Philadelphia, Trial Division, Criminal Section, entered April 11, 1984, at No. 3414, October Session, 1983
	:	
	:	___ Pa. Super. ___, ___ A.2d ___ (1985)
	:	
JOHN J. POTTS	:	Argued: October 23, 1986

O R D E R

PER CURIAM FILED: November 25, 1986

Appeal dismissed as having been improvidently granted. Mr. Justice Larsen and Mr. Justice McDermott dissent.

J. 25034/85

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOHN J. POTTS	:	No. 1336 Philadelphia, 1984

Appeal from the order entered on April 11, 1984, in the Court of Common Pleas of Philadelphia County, Trial Division, No. 3414 October Term, 1983.

BEFORE: Beck, Popovich, and Trommer*, JJ.

PER CURIAM: FILED MAY 31, 1985

Order affirmed.

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* Judge Evelyn M. Trommer, Senior Judge of the Court of Common Pleas of Philadelphia County, Pennsylvania, is sitting by designation.

J. 25034/85

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOHN J. POTTS	:	No. 1336 Philadelphia, 1984

Appeal from the order entered on April 11, 1984, in the Court of Common Pleas of Philadelphia County, Trial Division, No. 3414 October Term, 1983.

BEFORE: Beck, Popovich, and Trommer*, JJ.

MEMORANDUM:

This is an appeal by the Commonwealth from an order of the trial court finding a search to have been illegal and suppressing the fruits of that search. The Commonwealth in its appellate brief certified that the order suppressing evidence terminated the prosecution of the defendant. The appeal therefore is properly before

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* Judge Evelyn M. Trommer, Senior Judge of the Court of Common Pleas of Philadelphia County, Pennsylvania, is sitting by designation.

this court. See Commonwealth v. Dugger, ___ Pa. ___, 486 A.2d 382 (1985); Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304, cert. denied, 375 U.S. 910 (1963). We affirm.

The search was conducted on September 1, 1983, pursuant to a search warrant validly obtained for appellee's residence. The warrant specified that the police had probable cause to believe that illegal drugs were stored in the kitchen of appellee's house.

The circumstances of the search, as described by the trial court, were as follows. Five officers, dressed in plain clothes and backed up by several uniformed officers, were present on the scene. One officer approached the front door and observed that it was open. The other officers then approached the inner screen door and observed that it was unlocked and ajar. The officers looked through the transparent

screen door leading to the living room area and observed appellee sitting on a sofa in the living room watching television. One officer knocked on the screen door and announced that he and his fellow officers were the police and that they had a search warrant. The officers then immediately opened the screen door and entered the premises. During the split second that the officers knocked, announced their identity, purpose and authority and entered, appellee did not respond and did not move from the couch. In fact, he did not have the opportunity to respond or move, except for turning his head and looking in the officers' direction.

A search of the kitchen, located approximately ten feet from where appellee was seated, revealed the drugs and appellee was arrested. Appellee filed a motion to suppress physical evidence and following a

hearing, the trial court on April 11, 1984, issued a suppression order. From this order, the Commonwealth filed a timely notice of appeal.

The sole issue raised on appeal is whether the trial court erred as a matter of law in suppressing the evidence where the police, in executing a search warrant, knocked and announced their identity and purpose, but entered appellee's residence before he had an opportunity to respond.

After a careful review of the record, we hold that the trial court properly suppressed the evidence because the police officers violated the "knock and announce" rule, Pa. R.Crim.P. 2007, which is a codification of the Fourth Amendment of the federal constitution and Art. 1, Section 8 of the Pennsylvania constitution, as they did not give appellee the opportunity to respond by granting or denying entry before

they entered the premises. Because the trial court adequately discussed the issue appellant raises, there is no need for further comment.

Order affirmed.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION - CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	C.P. OCTOBER TERM, 1983
	:	NO. 3414
v.	:	
	:	(Superior Court
JOHN J. POTTS	:	No. 1336,
	:	Philadelphia 1984

O P I N I O N

MYERS CLARK, J.

FINDINGS OF FACT

1. On September 1, 1983, at approximately 5:30 p.m., four or five police officers assigned to the Narcotics Unit of the Philadelphia Police Department arrived with a search and seizure warrant at the home of the defendant, Mr. John J. Potts, located at 1552 Ruan Street in the City and County of Philadelphia. (N.T. 7-8, 3/1/84) (N.T. 2, 4/11/84).

2. All were dressed in plain clothes and were backed up by uniformed officers who were down the street. (N.T. 7-8, 16 3/1/84) (N.T. 2, 4/11/84)

3. Commanding Officer Robert Dintino instructed fellow Police Officer Carol Ralph to approach the front door of the house and survey the area, which she did. She reported that the front door was open. (N.T. 3, 3/1/84) (N.T. 2-3, 4/11/84)

4. Detective Dintino and the other officers went to the front door and observed the front door itself to be open. (N.T. 8, 3/1/84) (N.T. 3, 4/11/84)

5. They noted that the screen door was ajar and unlocked. (N.T. 8, 18-19, 3/1/84) (N.T. 3, 4/11/84)

6. Detective Dintino and the other officers looked through the transparent screen door leading directly into the living room area and observed the defendant

seated on a sofa, in the living room, watching TV. (N.T. 8, 3/1/84[)] (N.T. 3, 4/11/84).

7. Detective Dintino knocked on the screen door and announced that he and his fellow officers were the police and that they had a search warrant. (N.T. 8, 3/1/83 [sic]) (N.T. 3, 4/11/84)

8. Detective Dintino immediately opened the screen door and he and his fellow officers entered the premises. (N.T. 3, 3/1/84) (N.T. 3, 4/11/84)

9. During the split second that the police officers knocked and announced their identity, purpose and authority and entered, the defendant did not respond and did not move from the couch and, in fact, did not have the opportunity to respond or move (except for turning his head and looking in the officers' direction). (N.T. 4, 4/11/84)

CONCLUSIONS OF LAW

1. Based on the findings of fact, that the officers did not give the defendant an opportunity to respond, to grant or to deny entry, this Court concludes that the police officers entered the defendant's home in violation of Pennsylvania's "knock and announce" statutes 1/, the requirements

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1/ Pa. Rules of Criminal Procedure Rule 2007 entitled, "Manner of Entry Into Premises" provides:

(a) A law enforcement officer executing a search warrant shall before entry, give, or make a reasonable effort to give, notice of his identity, authority, and purpose to any occupant of the premises specified in the warrant, unless exigent circumstances require his immediate forcible entry.

(b) Such officer shall await a response for a reasonable period of time after announcement of identify [sic], authority and purpose, unless exigent circumstances require his immediate forcible entry.

(c) If the officer is not admitted after such a reasonable period, he may use as much physical force to effect entry therein as is necessary to execute the search. (See DeMichel and Newman, infra)

of which represent a codification of the Fourth Amendment 2/, and Article I, Section 8 of the Pennsylvania Constitution. 3/

2. There are two well-established rules in Pennsylvania regarding the execution of search and seizure warrants:

(a) That police officers are required to give notice of their identity and purpose before attempting to enter private premises; Commonwealth v. Newman, 429 Pa. 441, 240 A.2d 795 (1968), and

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2/ Fourth Amendment - "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and persons or things to be seized."

3/ Pa. Const. Art. I, Sect. 8 - "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without probable cause, supported by oath or affirmation subscribed to by the affiant.

(b) That where the police duly announce their purpose, forcible entry is "still unreasonable and hence violative of the Fourth Amendment if the occupants of the premises...are not first given an opportunity to surrender the premises voluntarily." Commonwealth v. DeMichel, 442 Pa. 553, 561, 277 A.2d 159, 163 (1971)

3. The announcement requirement is waived if exigent circumstances are present. Exigent circumstances include an attempt to flee or to destroy evidence. Ker v. California, 374 U.S. 23 (1963); Miller v. United States, 357 U.S. 301 (1958); Commonwealth v. DeMichel, supra; Commonwealth v. Newman, supra.

4. The mere fact that evidence being sought is easily destroyed does not suspend the requirement. There must be some affirmative action to support a belief that evidence is being destroyed. Commonwealth v. Dial, 445 Pa. 251, 285 A.2d 125 (1971).

5. The belief cannot be an assumption that evidence is being destroyed. Commonwealth v. DeMichel, supra; Commonwealth v. Cerulla, 223 Pa. Super. 24 (1972).

6. 18 U.S.C. Section 3109 in relevant part provides: "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose are given he is refused admittance..."

7. The entry into an unlocked door was nonetheless as prohibited by the statute as it would have been had the door been locked. Sabbath v. United States, 391 U.S. 585 (1968).

8. In leaving the front door to his premises open with a screen door in place, the defendant's privacy interest was diminished but not to the extent that the requirement of Rule 2007 providing that the

occupant of the premises be given an opportunity to surrender the premises voluntarily is vitiated.

9. Commonwealth v. Perry, 254 Pa. Super. 549, 386 A.2d 86 (1978), upon which the Commonwealth relies can be distinguished from the case at bar in that Perry involved a commercial establishment where the officers had observed "at least ten persons" enter without knocking.

10. In the absence of any action on the part of the defendant indicating either an intent to flee or an attempt to destroy evidence, the manner of the police officers' entry cannot be condoned and the fruits of the ensuing search must be suppressed.

_____

J.

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

TRIAL DIVISION

- - -

COMMONWEALTH	:	OCTOBER TERM, 1983
	:	
VS	:	NO. 8310-3414
	:	KNOW/POSS
JOHN J. POTTS	:	CONTROLLED SUB
	:	MAN W/I MAN/DEL
	:	CTRL SUB

- - -

Room 170, City Hall
Philadelphia, Pennsylvania
April 11, 1984

- - -

BEFORE: THE HONORABLE TAMA MYERS CLARK

- - -

APPEARANCES:

GAROLD E. TENNIS, ESQUIRE
Assistant District Attorney
For the Commonwealth

GILBERT SCUTTI, ESQUIRE
For the Defendant

- - -

Reported by: Catherine Black,
Official Court Reporter

THE COURT: I'll give oral findings of fact and conclusions of law to be supplemented if and when necessary.

Is that alright with both counsel?

MR. SCUTTI: Yes, Your Honor.

THE COURT: This is the matter of Commonwealth vs. John Potts, October Term, 1983, number 3414 here before this Court on a Motion to Suppress Physical Evidence.

The Court finds that on September 1, 1983 at approximately 5:30, five Philadelphia Police officers of the Narcotics Unit arrived with a search and seizure warrant at the rowhome of the Defendant, Mr. John Potts, located at 1552 Ruan Street in the City and County of Philadelphia. All the police officers were dressed in plain clothes. They were under the command of Detective Robert Dintino.

Detective Dintino instructed his fellow officer, Carole Ralph to approach

the front door of the house and survey the area, which she did. She reported that the front door was open. Detective Dintino and the other officers went to the front door and observed the front door itself to be open and noted that the screen door was ajar and unlocked. Detective Dintino and the other officers looked through the transparent screen door which led directly into the living room area and observed the Defendant seated on a sofa in the living room watching television. The Defendant was seated approximately forty feet from the front door. The living room in the dwelling was located directly adjacent to the kitchen, which was approximately ten feet from where Defendant was seated.

Detective Dintino knocked on the screen door and announced that he and his fellow officers were the police and that they had a search warrant. He immediately

opened the screen door and he and his fellow officers entered the premises with their badges displayed. They presented the Defendant with a copy of the search warrant and proceeded to search the premises.

The Court finds as a fact that during the split second that the police officers knocked and announced their purpose and authority and entered, the Defendant did not respond and did not move from the couch and, in fact, did not have the opportunity to respond or move. The Court found that the officers deliberately entered the premises quickly because they believed that otherwise, the contraband might be destroyed.

The Court concludes as a matter of law, that the officers gave proper notice of their identity, purpose and authority before entering the premises. The Court concludes that the officers did not give

the Defendant an opportunity to respond, to grant or to deny entry.

The Court concludes that by leaving his door open, the Defendant's privacy and interests were substantially diminished. However, the Court concludes that the privacy and interest was not relinquished to the extent that the requirement of Rule 2007 and the Fourth Amendment stating that the occupant of the premises be given an opportunity to surrender the premises voluntarily is vitiated.

The Court concludes as a matter of law, when there are exigent circumstances, both an announcement requirement, including any requirement for consentual [sic] entry is excused. In the case at Bar, the police officers, through their past experience, reasonably believed that the contraband would be destroyed if they had not entered immediately.

The Court concludes it's the law of Pennsylvania that a reasonable belief that evidence is being destroyed is an exigent circumstance which excuses compliance with the requirements of Section 2007. However, that belief cannot be an assumption that evidence is being destroyed or a belief that the evidence might be destroyed.

The Court concludes that the ease of destructibility of evidence alone is not an exigent circumstance. The Court notes that there is nothing in the record to indicate that the Defendant was attempting to flee or about to destroy evidence.

Therefore, the Court concludes that the requirements of Rule 2007 and the Fourth Amendment were not met in this case, and, therefore, the evidence must be suppressed. The Motion to Suppress the Evidence must be granted.

Now, these findings of fact and conclusions of law can and will be supplemented at the appropriate time, if necessary.

MR. TENNIS: Thank you. I would request that they be transcribed forthwith. Our office will be seriously considering an appeal.

THE COURT: How long do you need to consider that?

MR. TENNIS: Thirty days would be adequate for us.

THE COURT: Would that be for status?

MR. TENNIS: Yes, status, Your Honor.

THE COURT OFFICER: May 22nd, Your Honor.

THE COURT: Is that a problem with the rule?

MR. SCUTTI: We have consistently waived the rule. So, I'm not aware of any problem.

MR. TENNIS: I believe the case law is clear that the period of time in which we consider a possible appeal is consistent with our due diligence on a suppression matter.

THE COURT: Mr. Scutti, would you so stipulate?

MR. SCUTTI: If that's what the rule is, yes, Your Honor, of course.

THE COURT: Do either of you have a problem with May 23rd?

MR. SCUTTI: Well, --

THE COURT: That is longer than thirty days.

MR. TENNIS: We need May 11th or sooner.

THE COURT: I'm in chambers on the 11th, if you want me here.

MR. TENNIS: We'll have a decision by the week before.

THE COURT: Status or trial?

MR. TENNIS: This is for status. We're going to be deciding whether or not to take an appeal.

THE COURT: May 3rd.

MR. TENNIS: We're not going to be able to proceed to trial without the evidence in this case.

THE COURT: Will you stipulate to the time. We'll put it on May 3rd, Mr. Harris, status to determine whether the District Attorney -- counsel stipulated this time is excludable giving the District Attorney an opportunity to decide if it wants to appeal; is that correct?

MR. SCUTTI: Yes.

(Whereupon the proceedings were concluded at 12:00 noon.)